No. 89-442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALEXIA ANDERSON, *et al.*,
Petitioners,

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT THE AETNA CASUALTY AND SURETY COMPANY IN OPPOSITION TO PETITION

JOHN G. HARKINS, JR.*
DEBORAH F. COHEN
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia PA 19103
215-981-4000

W. SCOTT STREET, III
A. PETER BRODELL
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS
Two James Center
1021 East Cary Street
Richmond VA 23210
804-643-1991

RICHARD B. HERZOG
GERALD P. NORTON
MARK SCHATTNER
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington DC 20036
202-828-1200

Attorneys for Respondent The Aetna Casualty and Surety Company

* *Counsel of Record*

Dated: October 10, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Did the court of appeals correctly conclude that the district court did not abuse its discretion or exceed its authority when it certified a mandatory plaintiff class under Fed. R. Civ. P. 23(b)(1)(A) in this money damages case, where separate adjudications present the risk that the defendant would be subject not merely to inconsistent judgments but to mutually exclusive, conflicting duties constituting incompatible standards of conduct?

2. Is mandatory certification in a federal court class action consistent with the due process clause of the Fifth Amendment where: a settlement of the case in conjunction with a related consensual plan of reorganization provides class members with full compensation from a Claimants Trust and the opportunity for a jury trial against the Trust; petitioners were heard directly through their own counsel in the hearing on the fairness, adequacy and reasonableness of the settlement; and other private interests, both of other class members and of respondent Aetna, would otherwise have been harmed?

RULE 28.1 STATEMENT

Respondent: The Aetna Casualty and Surety Company

Parent: Aetna Life & Casualty Company

Subsidiaries (except wholly-owned subsidiaries):

South Bend Joint Venture
Aegen International, Inc.
Mariner Brookhollow Joint Venture
ADB I
Ponderosa Homes
ABP Associates Limited
Church Insurance Partnership Agency
Hyatt Plaza
Parklake Associates
Northlake Centre Associates
Central Trust Centre Associates
Aetna, Peterson, Jacobs and Ramo Technology Ventures
Taas Associates
Portside Properties Ltd.
211 East Ontario Associates
Executive Re, Inc.
Executive Risk Management Associates

Affiliates: None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Constitutional provision involved is the due process clause of the Fifth Amendment, which provides in relevant part:

> No person shall . . . be deprived of . . . property, without due process of law.

The rule involved is Fed. R. Civ. P. 23(b)(1), which reads as follows:

* * *

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NO. 89-4429

ALEXIA ANDERSON, *et al.*,

Petitioners,

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENT THE AETNA CASUALTY AND SURETY COMPANY IN OPPOSITION TO PETITION

Respondent The Aetna Casualty and Surety Company ("Aetna"), defendant in the district court and an appellee in the court below, submits this brief in opposition to the petition for a writ of certiorari. The opinion below is reported at 880 F.2d 709.

STATEMENT

The petition for certiorari in this case and a separate petition filed the same day in the interrelated case[1]

---

[1] *Rosemary Menard-Sanford v. A.H. Robins Co.*, No. 89-441. The interrelation of the two cases is described at pp. 3-6, *infra*. The Joint Appendix in the court of appeals is referred to as "J.A."

seek to overturn a comprehensive resolution of litigation arising from injuries relating to an intrauterine contraceptive device known as the Dalkon Shield. The Dalkon Shield was manufactured by A. H. Robins Company, Incorporated ("Robins"), the debtor in the companion case. Respondent Aetna was Robins' product liability insurer.

The early background and judicial involvement in Dalkon Shield controversies over the past 15 years is described in the opinion of the court of appeals (3a-28a). The petition here challenges a mandatory class certification by the district court, affirmed below, which was part of a settlement (the "Settlement") found by the district court after intensive scrutiny to be fair, adequate and reasonable. The Settlement satisfies a precondition of the merger of American Home Products and Robins, which merger in turn is a precondition of the Debtor's Sixth Amended and Restated Plan of Reorganization (the "Plan") pursuant to which a $2.475 billion Claimants Trust (the "Trust") will be established to compensate persons injured by the Dalkon Shield. Under the Settlement, Aetna will make available up to $425 million in cash and insurance for the payment of Dalkon Shield claims.

A. The Settlement And The Plan

Petitioners convey almost no sense of the nature and magnitude of the benefits made available under the Plan and the Settlement, and argue as if the loss of those benefits to other Dalkon Shield claimants would have been inconsequential. The mandatory certification in this case embodies a careful application of Rule 23 (in combination with an extraordinarily successful example of consensual reorganization under Chapter 11) to a set of unprecedented litigation circumstances:

1. The district court found, after a six-day evidentiary hearing, that $2.475 billion will be sufficient to pay in full all Dalkon Shield personal injury claims as well as expenses of administration over a reasonable period of time (21a-22a, 165a). Cash payments into the Trust when the Plan goes into effect, principally $2.255 billion from American Home Products and $75 million from Aetna, will with interest equal or exceed $2.475 billion.[2] The court of appeals upheld the factual finding that the Trust "will be sufficient" to achieve the goal of "full payment of all compensatory damages suffered by all Dalkon Shield claimants who have properly filed claims" (84a). Petitioners do not ask this Court to disturb that finding. Before this Court, the sufficiency of the Trust is an established fact.[3]

2. Over and above the cash, interest and income which the Trust will receive (including $75 million from Aetna), Aetna will provide $250 million in insurance coverage (the "Primary Excess Policy") against any remaining risk that the Trust will be insufficient to pay all claims (26a).

3. The Settlement was negotiated, structured and drafted in the context of a complex Chapter 11 con-

---

[2] Interest and income on the cash payments to the Trust are expected to be at least several hundred million dollars (Summary of Payments To Claimants Trust, J.A. 1852 n.*). The Trust will distribute, on a pro rata basis, additional sums in lieu of punitive damages if funds are available after the payment of compensatory claims (Dalkon Shield Trust Claims Resolution Facility ("CRF"), J.A. 1955).

[3] Petitioners assert that the fund may be insufficient (*e.g.*, Pet. 10, 13-14, 19). These assertions overlook the finding—unchallenged in the court below or in this Court—that the fund is in fact sufficient to pay potential claims in full.

sensual reorganization of Robins (*see* 19a-27a, 145a-46a, 150a-55a, 163a-66a) which, together with the Settlement in this case, will result in full compensation of petitioners' claims.[4] Thus, the classes in this case are defined with reference to compliance with initial procedures for claims against the Trust. Class A includes approximately 195,000 claimants, all of whom are entitled to claim against the Trust because they timely filed proofs of claim and questionnaires in accordance with the procedures established by the bankruptcy court (155a-56a). Class B includes approximately 125,000 claimants (173a) who failed to comply with those procedures (156a). The vast majority of Class B members are not eligible to claim against the Trust (*see* CRF, J.A. 1955; Special Note To Women Who Used The Dalkon Shield: How Your Dalkon Shield Claims Will Be Treated, J.A. 1862).[5] (Petitioners make no claims concerning members of Class B (Pet. 3 n.1).) To compensate Class B members under the Settlement, Aetna will make available two "Outlier Policies" in the total amount of $100 million. Both the Trust and the Outlier Policies will be governed by the terms of a single Claims Resolution Facility (Summary of Aetna Insurance Coverage, J.A. 2031).

---

[4] A number of these petitioners twice before attempted to sever litigation against Aetna from the reorganization proceeding. Both times, the court of appeals barred the attempt and this Court denied certiorari. *See Oberg v. Aetna Cas. & Sur. Co. (In re A. H. Robins Co.)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1246 (1988); *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).

[5] Certain Class B members (those who are "time-barred") may recover from the Trust on a subordinated basis, *i.e.*, if funds remain after Class A claims have been paid (155a; CRF, J.A. 1955).

4. Under the Claims Resolution Facility, both classes are given two options for filing claims under which the Trustees waive all substantive defenses (CRF, J.A. 1950-51). In a third option, arbitration, the Trustees will waive the defense of no product defect (CRF, J.A. 1952). Additionally, Class A members have an absolute right to a jury trial against the Trust (which substitutes for Robins as the defendant), with attornies of their choosing in the local venues where their cases could otherwise have been brought (27a, 73a). The settlement, arbitration or trial of claims is governed by otherwise applicable law (CRF, J.A. 1955).[6]

5. The notice of the Plan to claimants (members of Class A) described both the Plan and the Settlement. Almost 95 percent of the votes were in favor of the Plan (80a). Upon notice of their right to opt out, almost 98 percent of Class B members elected to remain in the class (*see* 173a).

6. Under the terms of the Settlement, merger agreement and Plan, had the district court not approved the Settlement and certified a mandatory class for punitive damages, there would have been no merger, no Plan, no $2.475 billion Trust (or $75 million in cash or $250 million in insurance coverage for the Trust from Aetna), and no $100 million of Outlier Policies. In addition to the interrelation of the Settlement and the Plan according to their terms, a further interrelation arose from the district court's consolidation of the instant

---

[6] The Trust "shall at all times, consistent with its purposes, minimize the intrusion" into the sexual history of the claimant (CRF, J.A. 1955). Even when a claimant chooses to litigate against the Trust, the Trustees may waive defenses relating to product defect and causation (CRF, J.A. 1953).

litigation and the adversary proceeding for contribution filed against Aetna in the reorganization by the Official Dalkon Shield Claimants' Committee (the "Committee") (139a-41a). The Committee, on behalf of Robins, sought contribution from Aetna. Aetna denied the claim but, alternatively, counterclaimed against Robins for contribution on the theory that if Robins had a claim against Aetna, Aetna would have a like claim against Robins. Finding the action duplicative of issues in the Breland class action, the district court consolidated the two matters and directed Aetna to respond. The consolidation, and Aetna's counterclaim, further demonstrate the factual linkage between the reorganization and the instant case.

7. The certification issue before the court of appeals was whether the district court had abused its discretion in certifying the class. If the certification had been reversed by the court of appeals, the Trust would have lost $75 million in cash and $200 million of coverage under the Primary Excess Policies. Class B members would have lost half ($50 million) of the funds otherwise available for them under the Outlier Policies. The same adverse impacts on both classes would result from the reversal of the certification sought by petitioners in this Court.

B. Litigation Against Aetna Under The "Off-Policy" Theories.

1. As claims mounted and Robins' financial situation became more precarious, Dalkon Shield claimants focused on Aetna as another " 'deep pocket' " (13a). By early 1985, complaints were being filed against Aetna on so-called "off policy" theories, that is, theories which sought to hold Aetna liable for its own conduct rather than the conduct of its insured, Robins, and to recover

from Aetna's assets rather than from the proceeds under the insurance policy.

2. The instant case began in 1986 when respondent Glenda Breland and six other plaintiffs sued Aetna on behalf of themselves and all other persons who could claim injuries or potential injuries from the Dalkon Shield (the "*Breland* litigation"). Aetna stipulated that, if a class were certified, it would agree to have issues of individual causation and damages resolved by the claims resolution process that would be a part of any reorganization of Robins (71a). In December 1986, over a year before Settlement was reached, and after allowing interventions for the purpose of opposing class certification, the district court conditionally certified the action as a class action under Rule 23(a) (134a-35a). Contrary to the statement in the petition (Pet. 9), the district court did not then determine whether the class would be mandatory. It did, however, determine that the requirements of Rule 23(a) were satisfied.[7] It was not until April 1988, nearly sixteen months later and after additional discovery, briefing and argument, that the district court certified a mandatory class. Subsequently, after conducting the further hearing required by Rule 23(e), the district court found the Settlement

---

[7] Petitioners assert that their case against Aetna is particularly weak with respect to women whose Dalkon Shields were removed prior to February 1975 "or perhaps as late as March 1978" (Pet. 6). Petitioners do not, however, ask the Court to disturb the findings below—unchallenged on appeal—that the class action prerequisites of commonality and typicality were satisfied in this case. A proper class does not require that all members have equally strong claims on the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (Rule 23 confers no authority "to conduct a preliminary inquiry into the merits . . . in order to determine whether [case] may be maintained as a class action").

to be fair, adequate and reasonable. Petitioners were heard through their own counsel at that hearing (79a-80a). Appeals to the Fourth Circuit followed.

3. The "off-policy" theories in the original complaints against Aetna alleged negligence, express and implied warranty, misrepresentation, conspiracy, fraud, and RICO violations. These earlier complaints "alleged virtually the same substantive claims" as those alleged by plaintiffs in the instant case (13a).

4. Both the district court and the court of appeals found the claims against Aetna in the *Breland* litigation to be weak legally and factually. Central to the off-policy complaints is a theory that Aetna had a duty to disclose publicly any deficiencies in the Dalkon Shield. The court of appeals concluded that "[o]bviously, the carrier has no such duty and no court, so far as we know, has ever so held" (89a). The court of appeals, affirming a like determination by the district court, stated that "Aetna had no dealings with any Dalkon Shield claimants, assumed no duty to such claimants and could not be liable to Dalkon Shield claimants under accepted insurance law" (88a; *see also* 88a-89a, 175a-76a). With respect to allegations of document destruction, the court of appeals stated that the "record is simply devoid of any evidence of any wrongful conduct on Aetna's part . . . " (90a). Prior to the point in the Robins reorganization when the bankruptcy court enjoined litigation against Aetna, Aetna had filed motions to dismiss for legal insufficiency in cases asserting off-policy theories. As the court of appeals noted, each of the several dozen such motions which had been ruled upon "had been granted" (14a & n. 11). Four other complaints had been voluntarily dismissed (*id.*). Thus,

no court anywhere had sustained the legal sufficiency of off-policy theories against Aetna.

C. The Mandatory Certification

1. Aetna argued below that the disclosure contemplated by the off-policy theories would disrupt fundamentally the traditional contractual duty of an insurer—heretofore uniformly recognized in all jurisdictions in the United States, without exception—to defend its insured, to maintain the confidentiality of information obtained from the insured in the course of the insurer-insured relationship, and to maintain loyalty to the insured arising from the duty to defend. Given Aetna's duties of defense, confidentiality and loyalty, separate adjudication of the off-policy theories would expose Aetna (and all other product liability insurers) to the risk of "incompatible standards" within the meaning of Rule 23(b)(1)(A). Information made public by Aetna pursuant to a new duty to disclose could not be confined to the state imposing that duty. The very disclosures required by one state could be a basis for imposing liability on Aetna to the insured (*e.g.*, on theories of breach of contract, negligence and bad faith) in other states which retain the traditional duties of confidentiality.

2. The district court found that Aetna's alleged liability "must be premised on facts arising out of [Aetna's] relationship" with its insured, Robins (148a). The district court further found that multiple adjudications of Aetna's obligations incident to its relationship with its insured "could yield incompatible standards and conflicting decisions concerning Aetna's role as an insurer to Robins and to others" (153a). The district court thus recognized that Aetna's conduct of the business of li-

ability insurance was at risk of being subjected to incompatible legal requirements.

D. The Opinion Below

1. The court of appeals upheld the district court's findings concerning the risk of incompatible standards. The court stressed "the uniqueness of this case" as the "overriding fact" (66a).[8] In affirming the district court, the Fourth Circuit noted that the relationship of Aetna to its insured "goes to the very heart of the plaintiffs' case here and overhangs the other issues in the litigation" (68a). Individual suits in different courts would therefore involve the risk not only of "varying" but of "contradictory" legal decisions regarding the insurer-insured relationship (81a). "The result would be chaotic" (*id.*). This situation provides "the very conditions contemplated in Rule 23(b)(1)(A) for class certification herein" (70a). Petitioners do not contest here these findings of the two lower courts, which rest upon contract and state law.

2. The court of appeals placed this case in context by a painstaking examination of class actions generally (*see* 32a-66a). Acknowledging an earlier "reluctance" by some courts to employ Rule 23 in mass tort cases (45a), the court saw a clear movement toward use of Rule 23 in such cases (52a).[9] This "new attitude," the

---

[8] Petitioners wrongly imply (Pet. 11) that the court saw uniqueness only in the number of claimants. The court followed that preliminary observation by a discussion of several key circumstances (*see* 66a-69a), one of which—the risk of incompatible standards—we discuss in text immediately following

[9] Petitioners challenge the court's discussion of these cases for failing to acknowledge "at that point" in the court's opinion that these cases upheld opt-out classes under Rule 23(b)(3) (Pet. 13).

court showed, has "found expression in a number of recent cases" (*id.*; *see also* 54a-61a) and has been urged by numerous commentators (*see* 45a-52a). The court pointed out the necessity for "rigorous analysis" of the particular case by the district court (40a), and stated that flexibility in applying the rule will best serve not only efficiency but "justice for the affected parties" (65a-66a). The court considered the important role which certification can play in facilitating settlement of complex litigation, as had occurred in this case, and the propriety of taking into account settlement as part of the discretionary decision whether to certify in a particular case (61a-65a, 74a). It was "unthinkable," the court said, to "permit a small number of claimants who are seeking actually to promote their own interests largely at the expense of the other claimants to frustrate a class certification" (79a) when "there is a ready remedy for expeditious adjudication and fair recovery available for the full 100% of claimants through a properly constructed class action . . . " (80a).

3. Having found "no abuse of discretion on the part of the District Judge in his certification herein under these circumstances" (74a), the court turned to the argument, based upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that due process requires an opt-out provision. The court found it unnecessary to resolve whether *Shutts* has implications for mandatory class actions in federal courts. The issue, the court said, is due process (75a-76a). Due process was satisfied in this case because the Plan gives to petitioners and every

---

Petitioners' hedged criticism is overly artful: when the court first discussed these cases earlier in its opinion, it explicitly pointed out as to each one that the court upheld a (b)(3) class (*see* 54a, 55a, 56a, 57a, 58a).

other member of Class A the absolute "right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial" (76a) with her own lawyer in a forum of her choosing under normal venue rules.[10]

4. The court then rejected as overly broad petitioners' reading of other opinions in which courts of appeal had reversed class certifications (76a-78a). The court concluded its analysis of the class certification by disposing of a few other objections not pressed here (78a-83a), and then sustained the district court's determination that the Settlement was fair, adequate and reasonable (83a *et seq.*), which ruling petitioners do not challenge in this Court.

REASONS FOR DENYING THE WRIT

Petitioners acknowledge that their "entire rationale for this case" is their belief that "the Claimants Trust may be inadequate to pay all claimants in full" (Pet. 13-14). Since that premise is contrary to the determinations below, unchallenged in this Court, that the fund will be sufficient, this case does not present an appropriate vehicle for considering either of petitioners' questions. Beyond this, there are other independent reasons why neither question merits review by this Court.

I. THE RULE 23(b)(1)(A) ISSUE DOES NOT WARRANT REVIEW

Petitioners present no conflict or other reason warranting review of the application below of Rule

---

[10] Class B members have the right to opt out and seek compensatory damages by trial from Aetna.

23(b)(1)(A). As the court of appeals and the district court found, "the risk of . . . incompatible standards of conduct for the party opposing the class" is patent in this case.[11]

If petitioners mean to argue that, notwithstanding a risk of incompatible standards, there is something in (b)(1)(A) that barred mandatory certification as a matter of law, they have failed to identify what that legal bar might be. They have not identified a question of law for the Court.[12] If petitioners are simply asking

---

[11] There is an independent and sufficient ground upon which to affirm the judgment below. As petitioners recognize (Pet. 19), the district court, in addition to finding a risk of incompatible standards, found that allowing separate adjudications "would severely impede the interests of other class members as a practical matter" (154a). A risk of impeding the interests of other class members is a basis for mandatory certification under Rule 23(b)(1)(B), not (b)(1)(A). Accordingly, Aetna argued in the court of appeals that the mandatory class could be certified under Rule 23(b)(1)(B) as well as (b)(1)(A). The argument was highly fact-specific: the Settlement brought a unique combination of benefits to class members that could not be obtained by any member through individual adjudication; such a combination of benefits constitutes "interests" of other class members within (b)(1)(B); absent mandatory certification, that combination of benefits would have been lost; and separate adjudications therefore would impair or impede the interests of other class members. The court of appeals affirmed the mandatory class under (b)(1)(A) and did not reach (b)(1)(B). Were the Court to grant certiorari, Aetna would argue the (b)(1)(B) justification as well, and it is possible that the Court would not need to reach the (b)(1)(A) issue raised by petitioners.

[12] The Court has declined before to adopt the "extreme position" that a nationwide mandatory class "may never be certified" in a category of cases involving some particular subject matter. *See Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979). The certification of such a class, "like most issues arising under Rule 23, is

the Court to review an exercise of discretion unanimously concurred in by two lower courts, they raise no issue that warrants granting their petition. *Cf. Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"). If petitioners are inviting this Court independently to exercise its discretion, they have sorely misconceived this Court's certiorari jurisdiction.[13]

A. The Decision Below Is Not In Conflict With Any Decision Of Any Other Court Of Appeals.

As petitioners would have it, all that was involved in this case was the possibility of Aetna "winning some cases and losing others" (Pet. 11), and such possibility of "inconsistent results" has, they say, been "rejected by every court of appeals that has considered it as a basis for mandatory certification under Rule 23(b)(1)" (Pet. 15). But not all "inconsistent results" involve "incompatible standards." Differing standards of care, for example, can ordinarily be complied with by adhering to the most demanding standard, as can differing duties to disclose, so long as elsewhere there is not a bar on disclosure, as there would be in this case. Typically, entry of a money judgment for a plaintiff in one case and dismissal of a money claim in another

---

committed in the first instance to the discretion of the district court." *Id.* at 703.

[13] Such an invitation seems to underlie petitioners' assertion that the Settlement and the Plan are not interdependent at the appeal stage (Pet. 14). Petitioners ignore the substantial adverse consequences on other class members of an appellate reversal. *See* p. 6, *supra*. In any event, the district judge applied Rule 23 in the context of a uniquely interrelated Settlement and Plan. It is that exercise of discretion which was reviewed by the court of appeals.

case arising out of the same events do not entail changes or conflicts in legal doctrine that give rise to a risk of incompatible standards. The Fourth Circuit itself has stated that money damage claims do not "normally" satisfy Rule 23(b)(1)(A). *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986). The decision below is not in conflict with the generally accepted view that Rule 23(b)(1)(A) does not allow mandatory certification when the only consequence of separate adjudications is that some plaintiffs may recover money damages while others do not. This is the rare case in which the legal theories advanced by class members seeking money damages could create mutually exclusive, conflicting duties subjecting Aetna to incompatible standards.

As this case illustrates, incompatible standards in substantive law can be just as disruptive of business conduct as incompatible standards contained in injunctions or declaratory judgments. To hold as a matter of law that (b)(1)(A) is unavailable to protect a defendant from the risk of incompatible standards in substantive law would be wholly without foundation in any language of the rule, and contrary to its purposes and to common sense, fairness and efficiency. Not surprisingly, petitioners fail to identify any such rule of law. None of the cases cited by petitioners (Pet. 15-16) presents a conflict between the Fourth Circuit and any other circuit in applying the incompatible standards requirement.

In their attempt to establish a conflict, petitioners rely on a decision rendered 14 years ago, *McDonnell Douglas Corp. v. United States Dist. Ct.*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *McDonnell* reversed a district court certification based upon a finding that, if separate actions were main-

tained, "defendants might be held liable in some actions but not in others." 523 F.2d at 1086. That is the ordinary risk in a money damages case. In the instant case, however, as we have shown, far more is involved than simply the risk that Aetna might have to pay damages to some plaintiffs and not to others.

In dictum in *McDonnell*, the Ninth Circuit went on to observe that (b)(1)(A) requires a risk of incompatible standards "in fulfilling judgments." *Id.* at 1086. A year later, the Ninth Circuit said that the risks contemplated by (b)(1) "ordinarily" are not present in a money damages case, and found "no circumstances" in the case before it to render that view "inapposite." *Green v. Occidental Pet. Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976).[14] The Fourth Circuit subsequently cited *Green* as support for its statement in *Zimmerman* that (b)(1)(A) is not "normally" available in a money damages case. 800 F.2d at 389. There is no basis for concluding that the Ninth Circuit, given the district court's finding of a risk of incompatible standards in the instant case, would hold that (b)(1)(A) is unavailable as a matter of law.

Petitioners cite *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984), but that is another case stating the unexceptionable proposition that the "fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)." *Id.* at 305. The Fourth Circuit said essentially the same thing in *Zimmerman*. Nothing in the opinion below

---

[14] *Green* involved an action under a federal statute, so there was no possibility of incompatible standards in the sense relevant here.

suggests that the Fourth Circuit disagrees with the general statement in *Bendectin*, and nothing in *Bendectin* suggests that the Sixth Circuit would have reversed the certification in this case.

The remaining cases cited by petitioner to establish a conflict do not construe (b)(1)(A) at all:

In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982), does not even construe Rule 23. The court held, over a vigorous dissent, that the mandatory certification in that case had the effect of enjoining pending state court actions, contrary to the Anti-Injunction Act. 28 U.S.C. § 2283. The court held that mandatory certification was not within that Act's exception for injunctions "necessary in aid of [the court's] jurisdiction." 680 F.2d at 1182. The court never addressed Rule 23.

In Re School Asbestos Litigation, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986), is not a case under Rule 23(b)(1)(A). In considering Rule 23(b)(1) the court focused exclusively on a limited fund issue under (b)(1)(B) (789 F.2d at 1002-08), and the case is thus not relevant here. Rule 23(b)(1)(B) makes no mention of incompatible standards, and its focus on risks to other class members is the opposite of the focus under (b)(1)(A) on risks to the party opposing the class. After examining the "special elements of the (b)(1)(B) class" in the context of that case (789 F.2d at 1002, 1005), the Third Circuit reversed. This decision does not establish a conflict between the circuits.

In re Temple, 851 F.2d 1269 (11th Cir. 1988), also involved a certification based on "limited assets" (*id.* at 1270), a (b)(1)(B) ground. The Eleventh Circuit reversed because the district court had failed to give class

members any opportunity to present evidence contesting the finding of a limited fund, which finding the court of appeals considered "premature and speculative." *Id.* at 1272. *Temple* does not involve certification based upon the (b)(1)(A) risk that the party opposing the class would be subject to incompatible standards.[15]

B. The Question Presented Is One Of First Impression On Unique Facts, And The Decision Below Is Not A Departure From Any Usual Practice.

Petitioners are unable to adduce a single case where multiple adjudications would have created a risk of incompatible standards under substantive law such that compliance with the law in one jurisdiction might violate the law in another. In none of the opinions cited by petitioners did the court of appeals have occasion even to discuss some particular substantive area of law to see whether multiple adjudications would create such a risk. It is evident that the likelihood of such a risk arising is quite rare, for it requires more than mere differences in legal standards.

---

[15] Petitioners further attempt to imply a conflict from the "reluctance" of another court that upheld a certification (*see* Pet. 17, citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir.), *cert. denied*, 108 S. Ct. 695 (1988)), and from decisions that upheld or held open the possibility of mandatory certifications because of circumstances not present in the instant case (*see* Pet. 16, 17, citing *Robertson v. National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977); *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978); *In Re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re Bendectin Prods. Liab. Litig.*, *supra*; *In Re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981)). The attempt is unavailing; if anything, these cases underscore how fact-dependent are applications of Rule 23(b)(1).

Because the requisite circumstances are so rare, petitioners are wrong in asserting that the certification below was a departure from "accepted practice" and "accepted standards" (*see* Pet. 15, 17). Petitioners apparently consider a "practice" as simply the *results* of prior (b)(1) cases, ignoring the fact that none presented a risk of incompatibility of the type presented here, all involved very different circumstances, and several involved (b)(1)(B) rather than (b)(1)(A).[16]

C. Petitioners' Predictions Of Far-Reaching Impacts Rest On A Misconstruction Of The Decision Below, And Are Otherwise Incorrect.

Petitioners' predictions of far-reaching impacts center not on the result below but on what they describe as the "rationale adopted by the court of appeals" (Pet. 18). In petitioners' rendering, the Fourth Circuit sustained the mandatory class merely because of considerations of efficiency (*id.*). Petitioners assert that since this justification would "apply to most mass tort cases and to all class certifications sought under all sub-parts of Rule 23," the rationale below would "obliterate" the differences among the subparts of Rule 23 (*id.*).

Petitioners' argument simply ignores the finding by the district court that separate adjudications against Aetna relating to the insurer-insured relationship would

---

[16] Petitioners are also incorrect in asserting that every "appeals court that had considered a mandatory class of any kind under Rule 23(b)(1) had rejected it" (Pet. 16). The Second Circuit has upheld (in a mandamus proceeding) the certification of a mandatory (b)(1) class for punitive damages. *See In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 861-62 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). In the subsequent appeal, the Second Circuit found it unnecessary to consider again the mandatory class certification. *In re "Agent Orange" Prod. Liab. Litig.*, *supra*, 818 F.2d at 167.

create a risk of incompatible standards, and the court of appeals' endorsement of that finding (*see* 70a, 81a) ("chaotic" result from separate adjudications).[17] The specific application by both courts below of the distinct requirement of (b)(1)(A) belies petitioners' rendering of the court of appeals' "rationale," and negates any prediction that the Fourth Circuit has made the other subparts of Rule 23 superfluous. Under the approach of the court below, only cases presenting a risk of incompatible standards to the party opposing the class will be certified under (b)(1)(A), and those will be rare among cases involving only separate claims for money damages.[18]

Petitioners insist that the controlling factors should have been "the opportunity to litigate the central issue in a different forum, which might be more convenient

---

[17] The risk of incompatible standards was not the only factor in addition to efficiency that the court of appeals weighed. The court considered the interests of 95% of other class members who want to be compensated under the Settlement and the Robins Reorganization Plan, and the inevitable delay in the reorganization because, absent approval of the Settlement, if Aetna were sued individually, it would have claims for contribution against Robins (70a-71a). It was not improper for the court also to consider the burdens that would be imposed on federal and state judicial systems by separate adjudications against Aetna.

[18] *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1545 (11th Cir. 1987) (cited at Pet. 18), stated "reluctantly" that (b)(1)(A) is available only in cases seeking injunctive and declaratory relief. The court did so in the apparent belief that if "compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections . . . meaningless." *Id.* The other subsections are not meaningless if certification under (b)(1)(A) is allowed only when there is a risk of incompatible standards emerging in substantive law, injunctions, or declaratory judgments.

for the victims, which might apply different and perhaps more favorable law . . . and which would afford the victims an opportunity to have their own counsel who could emphasize a different theory of the case or . . . different evidence" (Pet. 18). This contention is premised upon an asserted right to compensation from a particular defendant, *i.e.*, Aetna, notwithstanding that full compensation is available from another source (the Trust) which, in any event, receives cash and insurance coverage from Aetna. There is no such right. Moreover, the charge is wrong in every particular with respect to compensation from the Trust. Claimants may use counsel of their choosing. Venue is "unchanged" by the Reorganization (73a), and the normal venue rules therefore apply. Claims, whether settled or litigated, are governed by the law "that is or would have been applicable" in determining the liability of Robins, "notwithstanding the pendency of the Chapter 11 case" (CRF, J.A. 1955). Claimants are thus not inhibited in seeking full compensatory damages.

Furthermore, it is petitioners who would render (b)(1) meaningless. Most of the interests advanced by petitioners in individual control of separate actions could be advanced by plaintiffs in any money damages (or injunction) case, and all could be advanced in any case under state law. If, as petitioners would have it, these considerations always controlled, there never could be a mandatory certification under (b)(1)(A) or (B), or (b)(2), all of which would have been effectively repealed.[19]

---

[19] Rule 23(b)(3) explicitly requires a district court to take into account "the interest of members of the class in individually controlling . . . separate actions." Rule 23 (b)(1) does not. That difference does not mean that the interest in individual control is irrelevant under (b)(1), but it can hardly be required as a matter

According to petitioners, the Fourth Circuit justified a mandatory class on the basis that preservation of the right to a jury trial against the Trust retained for petitioners the "functional equivalent" (the phrase is petitioners') of an opt out. This supposed "major new interpretation of Rule 23 . . . further supports plenary consideration by this Court" (Pet. 19).

The "major new interpretation of Rule 23" is, however, not contained in, and certainly is not squarely presented by, the decision below. The court of appeals initially referred to the right to a jury trial in response to due process objections to the mandatory class (75a-76a). It noted that right again when it concluded that the district court acted in accordance with the general rule in certifying under (b)(1)(A) even though the action could have been certified under (b)(3) (82a). There is no suggestion by the court that in the absence of a risk of incompatible standards a mandatory certification under (b)(1)(A) would nevertheless have been proper because of the right to a jury trial. If that right bore upon the court's application of Rule 23 at all (as distinct from the due process clause), it was as a reason to affirm the ultimately discretionary decision of the district court to certify a mandatory class in the presence of the risk of incompatible standards. It is surely proper that preservation of the right to a jury trial be taken into account as part of the overall judgment whether to certify a mandatory class (and whether the Settlement was fair, adequate and reasonable).

Further, to the extent the opportunity for a jury trial against the Trust bore upon the court's decision,

---

of law to be dispositive, as petitioners would have it. If petitioners' challenge is instead to the exercise of discretion by the district court, it does not support an exercise of certiorari jurisdiction.

this case is unique. It took an extraordinary confluence of circumstances for a mandatory certification both to end litigation against the defendant and preserve an opportunity for jury trial for compensation. It was only the interrelation of the Plan and the Settlement in this case that made possible this unprecedented result. Such a unique set of circumstances militates against review by this Court.

II. THE DUE PROCESS ISSUE DOES NOT WARRANT REVIEW

A. The Court Below Correctly Made A Highly Fact-Bound Application Of The Due Process Clause In This Case.

The constitutional question is whether the court below correctly concluded that the due process clause of the Fifth Amendment is satisfied in the unique and complex circumstances of this case. Although petitioners seize upon the court's statement that the right to jury trial satisfied due process concerns (Pet. 22-23), petitioners' due process challenge, by its very nature, cannot be assessed without regard to the full factual context of this case.[20]

That context provides overwhelming support for the conclusion that the certification and settlement in this case amply comport with the due process clause. Among the relevant considerations (few of which are acknowledged in the Petition) are:

(a) the safety and sufficiency of the Claimants Trust, as augmented by the Primary Excess Policy (so that petitioners have not been deprived of any property);

---

[20] This Court " 'reviews judgments, not statements in opinions.' " *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *accord, FCC v. Pacifica Foundation*, 438 U.S. 726, 734-35 (1978).

(b) the options for full recovery short of litigation or arbitration against the Trust, and, upon the exercise of such options, the waiver by the Trust of all substantive defenses (CRF, J.A. 1951-52);

(c) the preservation of the opportunity for jury trial against the Trust, and the opportunity of a claimant to employ counsel of her own choosing in such litigation;

(d) the applicability of normal venue rules in such litigation (73a);

(e) the applicability to the settlement or trial of claims of the law "that is or would have been applicable" in determining the liability of Robins "notwithstanding the pendency of the Chapter 11 case" (CRF, J.A. 1955);

(f) the finding by the district court, affirmed by the court of appeals, and not challenged here, that the representative parties fairly and adequately represent the class (78a-79a; 149a);

(g) the fact that these petitioners were heard directly, through their own counsel, in the hearing conducted by the district court pursuant to Rule 23(e) on the fairness and adequacy of the Settlement;

(h) the interrelation of the Plan and the Settlement; and

(i) the fact that the district court's certification was bottomed not merely on efficiency but on avoiding unfairness to the hundreds of thousands of other class members who would have totally lost the benefits of the Plan had the district court not certified a mandatory class for punitive damages, and on avoiding

unfairness to Aetna, which faced the risk of incompatible standards from separate adjudications.[21]

The specificity of circumstances in this case distinguishes it from cases in which the Court has taken jurisdiction to make due process determinations. Such cases typically have involved ongoing government programs or practices, and a procedural question the resolution of which would govern the program or practice in the future. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Such an opportunity for guidance does not exist here.

Further, such cases have involved the traditional due process conflict between private interests in more procedure and governmental interests in less procedure. In the present case, however, private interests are arrayed against other private interests. More procedure in the form of individual adjudication threatens other private interests, both of other class members and of Aetna. Petitioners are therefore wrong when they say that the sole balance in this case is between the "individual's interest in her own adjudication" and the

---

[21] *Cf. Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320-21, 326 (1985) ("flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution" than formal adversary procedures; court must weigh "marginal gains from affording an additional procedural safeguard" against "societal cost of providing such a safeguard"); *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) ("degree of potential deprivation" bears upon due process requirements); *United States v. Kras*, 409 U.S. 434, 445-46 (1973) (practical means of relief other than the one preferred by the claimant).

"societal interest" (*see* Pet. 23). Petitioners in fact are asking the Court to mediate among conflicting private claims.

B. If *Phillips Petroleum Co. v. Shutts* Has Implications For Class Actions In Federal Court, This Is Not The Case In Which To Determine Them.

Petitioners assert that the court below "has plainly not followed the clear mandate" in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (Pet. 21). Petitioners apparently believe that *Shutts* substantially limits the utility of Rule 23 by mandating in all money damage cases in federal court an opt-out right for any plaintiff class member (*see* Pet. 21-22).

There is, however, no conflict between *Shutts* and the decision below. Unlike the decision below, *Shutts* involved a class action in *state* court. *Shutts* decided a question of the personal jurisdiction of a state court over unnamed plaintiff class members whose contacts with the state were insufficient to satisfy the due process clause of the Fourteenth Amendment. *Shutts* did not involve a question of the procedures required by the Fifth Amendment in the presence, as in this case, of minimum contacts with the sovereign that created the court, the United States.[22]

---

[22] The question presented in the petition for certiorari in *Shutts* was whether a "state court in a class action" can "exercise jurisdiction" over unnamed class members "who have had no contact with the forum state. . . . " Petition For A Writ Of Certiorari To the Supreme Court Of The State Of Kansas at "Questions Presented," *Phillips Pet. Co. v. Shutts, supra*. The petitioner's argument in *Shutts* was that, unless "out-of-state plaintiffs affirmatively consent, the *Kansas courts may not exert jurisdiction* over their claims." 472 U.S. at 806 (emphasis added). The petitioner in *Shutts* (the defendant in the class action), had standing to raise

Further, the class certification in *Shutts* was under the Kansas equivalent of Rule 23(b)(3). That rule is bottomed on convenience and system economy, and focuses on whether it would be fair and efficient *to* certify. Rule 23(b)(1), by contrast, is applicable where *not* to certify would be unfair because separate adjudications will risk impairing the interests of other class members or leaving the party opposing the class subject to incompatible standards. Both risks are present in the instant case, and they weigh heavily in the due process balance. Neither risk was present in *Shutts*. Indeed, *Shutts* expressly limited its holding to cases where "the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law." 472 U.S. at 811 & n.3. Separate adjudications of money damage claims typically do not risk leaving the party opposing the class subject to incompatible standards. The disclaimer in *Shutts* with respect to cases other than for money damages is reasonably read to encompass this case, which involves risks from separate adjudications not present in the typical money damages case.

Thus, *Shutts* does not directly govern here. At most, the question is whether *Shutts* has implications for mandatory class actions in federal courts. But there is no conflict among the circuits or with any decision of this Court as to whether there are such implications.

---

the due process claim of absent plaintiff class members only because a state "judgment issued without *proper personal jurisdiction* over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Id.* at 805 (emphasis added). This Court held that the consent afforded through an opt-out procedure was sufficient to sustain the state court's jurisdiction over plaintiff class members otherwise lacking minimum contacts with the state. *Id.* at 812.

Petitioners are wrong in their assertion (Pet. 21) that the Eleventh Circuit in *In re Temple* "concluded that the ruling [in *Shutts*] applies fully to federal court litigation." The Eleventh Circuit expressly recognized that it did not need to reach the *Shutts* issue. 851 F.2d at 1272-73 n.5. The opinion merely observes that *Shutts* "may" provide a right to opt out in a money damages case, and that "no federal appellate court has yet so held . . . . " *Id.* In *School Asbestos Litigation* (Pet. 21-22) the Third Circuit found "consideration of [*Shutts*] unnecessary." 789 F.2d at 1007-08. The article cited by petitioners (Pet. 21) does not reach a firm conclusion (*see* 75a; Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 30-31 (1986)).[23] In any event, any question concerning *Shutts*, if there is one, is not likely to arise with any frequency because money judgment cases will only rarely satisfy the preconditions for mandatory certifications under Rule 23. It is a question better left to be refined if and as it arises in the federal system.

---

[23] Petitioners' citation of *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (Pet. 22) is inapposite. *Martin* did not involve the rights of members of a class. Moreover, the opinion specifically notes that class actions are an exception to the very statement quoted in the Petition (*see* 109 S. Ct. at 2184 n.2) and does not mention *Shutts*. Petitioners assert that the Third Circuit employed a different "spirit and method of analysis" (Pet 23) in *In Re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (1989), *cert. denied sub nom. Chicago Land & Title Co. v. Tucson Unified School Dist.*, No. 88-2050 (Oct. 2, 1989). If such differences exist, they do not establish a conflict. Indeed, the Third Circuit had previously affirmed the mandatory class certification in that very case, *see In Re Real Estate Title & Settlement Servs. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988), and the denial of a motion to opt out by one of the class members, *Appeal of Arizona*, 815 F.2d 696 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN G. HARKINS, JR.*
DEBORAH F. COHEN
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia PA 19103
215-981-4000

W. SCOTT STREET, III
A. PETER BRODELL
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS
Two James Center
1021 East Cary Street
Richmond VA 23210
804-643-1991

RICHARD B. HERZOG
GERALD P. NORTON
MARK SCHATTNER
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington DC 20036
202-828-1200

Attorneys for Respondent The Aetna Casualty and Surety Company

* *Counsel of Record*

Dated: October 10, 1989